Nos. 05-56175, 05-56178, 05-56056

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS ALBERTO GALVIS MUJICA, ET AL.,
Plaintiffs-Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, and AIRSCAN, INC.
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States hereby submits this brief in support of affirmance of the district court's judgment of dismissal. The plaintiffs are Colombian nationals who have sued private companies for injuries incurred in a bombing of Santo Domingo, Colombia, reportedly conducted by the Colombian Air Force. The plaintiffs ask a U.S. court to declare unlawful a military action assertedly undertaken by the Colombian Air Force, which was engaged in fighting against a guerilla insurgency in that country.

The United States expresses no view on the merits of the plaintiffs' allegations, and deplores any violation of human-rights law that might have occurred. Because adjudication of this case would adversely affect the United States' foreign policy interests, however, we participate as amicus curiae in support of affirmance.

The district court dismissed the plaintiffs' claims on the ground that U.S. foreign policy interests render the claims non-justiciable and preempt the plaintiffs' state-law claims. While the United States agrees with this ultimate disposition, we believe that dismissal of the plaintiffs' claims is most appropriate as a matter of international comity.

The plaintiffs have been awarded a substantial compensatory judgment in Colombia for harms suffered in the Santo Domingo bombing. Under Colombian law, that judgment, unless reversed on appeal, precludes another lawsuit by the plaintiffs seeking additional damages for the same harm. Permitting this lawsuit to go forward in a U.S. court, potentially second-guessing the findings of a Colombian court, would be inconsistent with Colombia's rule against double recovery and could harm our relations with that foreign sovereign.

Because the dismissal of the plaintiffs' claims can be affirmed on the ground of international comity, it is unnecessary to consider whether the claims would fail on other grounds as well. As we next show, however, the plaintiffs'

claims under the Alien Tort Statute, 28 U.S.C. § 1350 (Section 1350 or ATS), also fail as a matter of federal common law, and their claims under California law are barred.

For the reasons articulated below, a court should not recognize claims under Section 1350 challenging a foreign government's treatment of its own citizens within its own borders, without a Congressional directive in this regard. Absent Congressional direction, furthermore, a court should not exercise its narrow common-law authority under Section 1350 to recognize a civil claim for aiding and abetting — a vast expansion of liability that would interfere with the Executive's conduct of foreign policy.

As to the state-law claims, constitutional principles highlight the need for a careful balancing of interests where a state seeks to apply its law to conduct occurring wholly outside its borders, in a manner that could conflict with federal foreign policy or impede the federal government's ability to speak with one voice in foreign affairs. Here, general choice-of-law principles require application of Colombian law — which would appear to bar this lawsuit — to a dispute arising

in Colombia, involving alleged harm to Colombian citizens, and challenging the conduct of the Colombian military.[1]

STATEMENT

1. Plaintiffs, former residents of Santo Domingo, Colombia, brought this action against Occidental Petroleum Corp. and AirScan, Inc., for harm incurred in a 1998 bombing on Santo Domingo reportedly conducted by the Colombian Air Force. Occidental operates an oil production facility and pipeline in Colombia, in a joint venture with the Colombian government. AirScan provides security for the facility and pipeline. The bombing of Santo Domingo was assertedly carried out by the Colombian Air Force, *see* Appellants' Excerpts of Record (E.R.) 9, in the course of defending the pipeline against insurgent attacks. Plaintiffs allege that Occidental and AirScan "provided substantial assistance to the [Colombian Air Force] unit that perpetrated" the bombing, Pl. Br. 1, and conspired with and worked in tandem with the Colombian military to carry out the attack. E.R. 28.

[1] In addressing these issues as amicus curiae, the United States wishes to make clear that the decision not to address other legal doctrines should not be understood to indicate any view regarding their application by the district court or the parties.

Plaintiffs brought claims under Section 1350 and the Torture Victims Protection Act (TVPA), as well as state-law claims for wrongful death, infliction of emotional distress, and unfair business practices. *See* E.R. 37-38.

2. On February 3, 2004, before the filing of the answer or any dispositive motion, the district court solicited the views of the Department of State. The United States initially responded that, with the litigation "in its earliest stages" and a key legal issue pending before the Supreme Court (in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)), the Government was unable to "make a reasoned assessment of the likely impact of the litigation upon our foreign relations." E.R. 157.

On December 29, 2004, the United States filed a Supplemental Statement of Interest "set[ting] forth the current views of the United States concerning the impact of this litigation on its foreign policy." E.R. 406. In an attached letter, the State Department stated its view "that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States." E.R. 409.

As the State Department noted, in May 2004, a Colombian court had ordered the Colombian government to pay substantial damages to the plaintiffs and other persons injured in the Santo Domingo bombing. E.R. 409. The Colombian government had instituted a criminal investigation into the conduct of

military personnel. E.R. 409.[2] In addition, the United States Government had suspended assistance to the Colombian Air Force unit involved. E.R. 409-410.

The State Department explained that the United States' foreign policy is to encourage other countries to establish "responsible legal mechanisms for addressing and resolving alleged human rights abuses." E.R. 410. Permitting "[d]uplicative proceedings in U.S. courts second-guessing the actions of the Colombian government and its military officials and the findings of Colombian courts" could harm our bilateral relationship and could suggest that our Government does not recognize the legitimacy of Colombian judicial institutions. E.R. 410. The State Department noted the importance of supporting "the rule of law and human rights in Colombia," one of our "closest allies in this hemisphere, and our partner in the vital struggles against terrorism and narcotics trafficking." E.R. 410.

The State Department also explained that permitting lawsuits such as this one to go forward could "deter[] present and future U.S. investment in Colombia," and that "[r]educed U.S. investment, particularly in the oil and other extractive industries," could "damage the stability of Colombia" and undermine U.S. efforts

[2] Military officials involved in the incident have been charged with criminally negligent homicide, and are being prosecuted in a Colombian civilian court, where proceedings are underway.

to expand and diversify its sources of imported oil, as well as U.S.-sponsored initiatives in Colombia against terrorism and narcotics trafficking. E.R. 410. The State Department attached communications from Colombia, one specifically noting the litigation's potential impact on U.S.-Colombia relations. E.R. 414.

3. The district court held that Section 1350 authorized imposition of civil liability for aiding and abetting a violation of international law, relying on a vacated opinion of this Court.[3] E.R. 657 & n.6. The district court also held that it could impose liability for the military's raid on Colombian citizens in that country. E.R. 673-676. The district court did not acknowledge the significant practical consequences, including potential harm to our foreign relations, of permitting these claims under Section 1350.

However, the district court held that the United States' foreign policy interests preempted the plaintiffs' state-law claims, in light of California's "weak interest" in application of state tort law to a dispute arising wholly outside California and brought by foreign plaintiffs. E.R. 684-686.

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[3] *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *but see Doe I v. Unocal Corp.*, 395 F.3d 978, 979 (9th Cir. 2003) (en banc) (granting rehearing of panel decision, which "shall not be cited as precedent by or to this court or any district court of the Ninth Circuit"), appeal dismissed, 403 F.3d 708 (9th Cir. 2005).

Finally, the district court held that the plaintiffs' claims were non-justiciable under the political question doctrine. E.R. 691-700. The court reasoned that the adjudication of the claims "would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general." E.R. 697.[4]

ARGUMENT

I. THE UNITED STATES' FOREIGN POLICY INTERESTS ARE A PROPER BASIS FOR DISMISSAL OF THE PLAINTIFFS' CLAIMS.

The district court declined to entertain the plaintiffs' claims on the ground that, as the United States informed the district court in its Supplemental Statement of Interest, "adjudication of this case will have an adverse impact on the foreign policy interests of the United States." E.R. 409; *see* E.R. 696-697, 700.[5]

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[4] The district court refused to dismiss the action on the grounds of international comity or forum non conveniens. E.R. 720-723, 735, 751-753. The district court also refused to dismiss claims under the act-of-state doctrine, which limits a U.S. court's authority to evaluate the lawfulness of a foreign sovereign's official acts within its own territory. E.R. 686-691. However, the district court held that the plaintiffs' claims under the Torture Victims Protection Act were barred because corporations are not "individual[s]" subject to liability under the statute. E.R. 661-662.

[5] The plaintiffs are incorrect to suggest (at Pl. Br. 36-37, 46-47) that the Supplemental Statement of Interest does not constitute a formal and definitive expression of the Executive Branch regarding the United States' foreign policy

(continued...)

The plaintiffs' claims, although brought against private defendants, nevertheless challenge the lawfulness of military conduct taken by the Colombian Air Force in the course of a campaign against guerilla insurgents. That conduct was the basis for a lawsuit brought against the Colombian government in Colombian administrative court by the plaintiffs and other victims of the Santo Domingo bombing. The Colombian administrative court ordered the government to pay substantial damages, in a ruling that is currently on appeal. E.R. 409. In addition, military officials involved in the incident are being prosecuted in Colombian civilian courts on criminal charges of negligent homicide. Permitting litigation in U.S. courts to second-guess the "findings of the Colombian courts," with "the potential for reaching disparate conclusions, may be seen as unwarranted and intrusive" by the Colombian government and as a refusal to accept the

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[5](...continued)
with respect to this litigation. *See Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (describing Statement of Interest as "the considered judgment of the Executive on a particular question of foreign policy"); *see also, e.g., Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 62 n.7 (2d Cir. 2005); *Ye v. Zemin*, 383 F.3d 620, 623 n.6 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 1840 (2005). Similarly, the plaintiffs are misguided in suggesting (at Pl. Br. 34-37 & n.8) that a court may second-guess the foreign policy interests expressed in the Supplemental Statement of Interest. *See, e.g., Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (noting that it "is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch"), *cert. denied*, 529 U.S. 1104 (2000).

legitimacy of the Colombian judicial system. E.R. 409-410 (noting that litigation could potentially harm "our bilateral relationship with the Colombian government"). In light of the existing damages judgment in favor of the plaintiffs, furthermore, permitting the plaintiffs to seek additional damages in this lawsuit would be inconsistent with the basic principle of Colombian law barring double recovery for the same harm. *See* E.R. 720-723.

The district court invoked these foreign policy interests as a basis for dismissal under the political question doctrine. Several courts of appeals have recognized that the foreign policy interests of the United States may properly support dismissal on political question grounds. *See, e.g., Alperin v. Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 and 126 S. Ct. 1106 (2006); *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69-72 (2d Cir. 2005); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48-53 (D.C. Cir. 2005), *cert. denied*, No. 05-543, 2006 WL 387133 (U.S. Feb. 21, 2006); *cf. Linder v. Portocarrero*, 963 F.2d 332, 335-336 (11th Cir. 1992) (holding that political question doctrine bars challenge to Nicaraguan contras' choice of military targets in civil war). Dismissal may also be appropriate under related legal doctrines, such as case-specific deference to United States foreign policy interests, *see Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *Sosa v. Alvarez-*

Machain, 542 U.S. 692, 733 & n.21 (2004) — a disposition that can itself be understood as resting on the political question doctrine or parallel prudential considerations.

In this case, however, it is not necessary for this Court to address the district court's holding that the plaintiffs' claims are barred by the political question doctrine, because the particular foreign policy interests identified by the United States' Supplemental Statement of Interest warrant dismissal of the litigation under the doctrine of international comity. As a matter of international comity, "United States courts ordinarily * * * defer to proceedings taking place in foreign countries, so long as the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (citations and internal quotation marks omitted). International comity seeks to maintain our relations with foreign governments, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute or otherwise sitting in judgment of the official acts of a foreign government. *See generally Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895); *see also* E.R. 410 (expressing position of State Department that it is in the United States' interest for foreign courts generally to "resolve disputes arising in foreign

countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly").

The district court properly recognized the "substantial interest" of the United States and the "strong interest" of our regional ally, Colombia, in having the lawfulness of military action reportedly taken by Colombian military officials in the course of fighting against insurgents in that country adjudicated exclusively in Colombian courts. *See* E.R. 749. The district court also recognized that the plaintiffs have received an award of damages against the Colombian government in a Colombian court for the harm they suffered in the bombing, and that an appeal of that award is currently pending in Colombia. *See* E.R. 720-722 & n.5. The district court nonetheless declined to dismiss this litigation on international comity grounds, reasoning that Colombian courts provide an inadequate forum because the existing damages award to the plaintiffs, unless reversed on appeal, would be deemed "full reparation" for their harm and would preclude any claims for additional recovery from Occidental and AirScan. *See* E.R. 753, 720-723.[6]

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[6] The district court also suggested that Colombia might be an inadequate forum because the plaintiffs' personal safety might be at risk if they returned to Colombia to pursue litigation against Occidental and AirScan. *See* E.R. 718. If, as the district court held, the existing judgment in favor of the plaintiffs (which the court suggested was likely to be upheld on appeal, *see* E.R. 722 n.5) would bar any future litigation against Occidental or AirScan, *see* E.R. 721-723 & n.5, then the (continued...)

Contrary to the district court's reasoning, the single-recovery rule of Colombian law (the same rule that applies under California law, *see Vesey v. United States*, 626 F.2d 627, 633 (9th Cir. 1980)) is itself entitled to respect as a matter of international comity. *See Bi v. Union Carbide Chems. Co.*, 984 F.2d 582, 586-587 (2d Cir.), *cert. denied*, 510 U.S. 862 (1993). In determining whether to dismiss a case in deference to foreign litigation, a U.S. court considers whether the foreign proceedings are "consistent with civilized jurisprudence" and U.S. public policy. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (quoting *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994)). A foreign forum is not rendered fundamentally unfair simply because the plaintiffs' claims would be barred under a neutral principle of law. *See, e.g., Ungaro-Benages*, 379 F.3d at 1239-1240; *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 159 (2d Cir. 2005) (recognizing distinction in this regard between forum non conveniens and international comity), *petition for cert. filed*, 74 U.S.L.W. 3487 (U.S. Feb. 17, 2006) (No. 05-1070); *cf. Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-382 (5th Cir. 2002) (invoking comity to hold that Mexican courts are not inadequate under forum non conveniens simply

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[6](...continued)
potential existence of other impediments to the litigation would not be relevant for purposes of international comity.

because cap on damages effectively bars lawsuit for wrongful death of a child), *cert. denied*, 538 U.S. 1012 (2003). Here, the Colombian principle of single recovery is fully consistent with fundamental fairness and U.S. public policy. International comity thus provides an alternative ground for affirmance of the district court judgment.

Because dismissal on international comity grounds would dispose of this action, it is not necessary to determine whether additional grounds support dismissal of the plaintiffs' claims. Should the Court choose to reach the issue, however, we next show that the plaintiffs' Section 1350 claims fail to meet the stringent standards for federal common-law claims and their state-law claims are barred under Colombian law.

II. THE ALIEN TORT STATUTE DOES NOT AUTHORIZE THE PLAINTIFFS' INTERNATIONAL-LAW CLAIMS.

In bringing claims under customary international law, the plaintiffs invoke the district court's narrow common-law authority under the Alien Tort Statute, 28 U.S.C. § 1350, to recognize a limited number of implied causes of action derived from international-law norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Sosa*, 542 U.S. at 725. As the *Sosa* Court warned, however, a court's federal common-law

authority to recognize causes of action must be exercised with "great caution" and "war[iness]," particularly where the exercise of common-law authority could impinge upon the political branches' discretion "in managing foreign affairs." *Id.* at 724-725, 727.

The district court permitted most of the plaintiffs' Section 1350 claims to go forward based on the misconception that the only relevant policy concerns were "(1) the extent to which recognizing an ATS claim would allow foreign plaintiffs to pursue claims in U.S. courts; and (2) the extent to which recognizing an ATS claim would unnecessarily duplicate remedies provided through other federal laws." E.R. 673. In *Sosa*, however, the Supreme Court explained that the inquiry whether to entertain a claim as a matter of federal common law is intended to set a "high bar," with a court required to consider the "practical consequences" and "potential implications for [U.S.] foreign relations" of recognizing a claim. 542 U.S. at 727, 732. The Court also suggested that "case-specific deference to the political branches" might be appropriate based on the Executive Branch's view of our foreign policy interests. *Id.* at 733 n.21. Where the plaintiffs' claims implicate the United States' foreign policy interests so substantially that the district court concluded the political question doctrine applies, those same interests should have been given great weight in the court's analysis whether to

recognize the plaintiffs' claims under Section 1350, as we next explain in more detail.

A. Absent Congressional Directive, A Court Should Not Recognize A Common-Law Claim To Challenge A Foreign Government's Treatment Of Its Own Nationals Within Its Own Territory.

The plaintiffs' claims, although brought against private corporations rather than the Colombian government itself, attack the conduct of the Colombian Air Force. They seek to hold the defendants liable for the actions of the Colombian Air Force in allegedly carrying out the bombing of Santo Domingo, Colombia. *See, e.g.,* E.R. 11-12 (seeking to hold defendants directly and vicariously liable for tortious actions of Colombian military); E.R. 8-9 (detailing assertedly unlawful conduct of Colombian Air Force "in carrying out [the] raid" upon Santo Domingo). As we next explain, in the absence of a Congressional directive, this Court should not permit a claim under Section 1350 challenging the conduct of a foreign government against its own citizens and within its own territory.

1. Under Section 1350, a court may apply federal (*i.e.*, U.S.) common-law to create a limited number of causes of action that employ as the rule of decision a substantive standard drawn from international law. *See Sosa*, 542 U.S. at 712 (explaining that ATS "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law");

id. at 731 n.19 (ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations"). A court asked to recognize a claim, therefore, must decide whether challenged conduct should be governed by *U.S. law*, with federal common law determining substantive liability and the crafting of any remedy. In this case, adjudication of the plaintiffs' Section 1350 claims would require the district court to apply U.S. common law extraterritorially to regulate the conduct of Colombian military officials, in Colombia, against Colombian citizens.

When construing a federal statute, there is a strong presumption against projecting United States law to resolve disputes that arise in foreign nations, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) — a principle that applies with particular force to conduct by a foreign government affecting its own citizens. The same strong presumption existed in the early years of this Nation, when even the federal statute defining and punishing one of the principal violations of the laws of nations, piracy, was held not to apply to an offense committed by foreign citizens under the jurisdiction of a foreign government. *See United States v. Palmer*, 16 U.S. 610, 630-634 (1818). In the words of Justice Story, sitting as Circuit Justice,

> If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public [international] law, I do not know, that that law has even held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior.

United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822).

While the *Sosa* Court concluded that Congress intended, in enacting the ATS, to confer on federal courts the common-law power to adjudicate a limited set of international-law claims, the Court expressly questioned the application of this power to claims arising from a foreign government's conduct toward its own citizens. 542 U.S. at 728. The assaults on ambassadors that preceded and motivated the enactment of the ATS involved conduct purely within the United States, and the general aim of the statute was to ensure that the National Government could provide a forum in which a nation offended by such conduct against it or its nationals might obtain redress, and thus reduce the potential for hostility against the United States for acts within its own territory. *See id.* at 715-718. Given the accepted principles of the time, it is unlikely in the extreme that the drafters of the ATS intended to grant to the newly created federal courts an

unchecked power to adjudicate extraterritorial disputes regarding a foreign government's treatment of its own subjects.[7]

Against the historic and doctrinal backdrop of Section 1350, and reinforced by the caution mandated by the Supreme Court in *Sosa*, a district court should not create a federal common-law claim under U.S. law (incorporating the court's view of what international norms should be enforceable under U.S. law) to adjudicate the alleged mistreatment of foreign nationals by their own government within its own territory.

2. Practical consequences weigh strongly against permitting a claim under Section 1350 arising out of a foreign government's allegedly unlawful treatment of its own citizens within its own borders.

As the *Sosa* Court recognized, the potential for adverse foreign policy effects is likely to be especially great where U.S. courts are asked to sit in judgment of the conduct of foreign officials abroad. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to

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[7] Indeed, Attorney General Bradford's opinion from 1795, which was cited by the district court in adopting aiding-and-abetting liability under Section 1350, explained that, insofar as the offenses "complained of originated or took place in a foreign country, *they are not within the cognizance of our courts*." *See* 1 Op. Att'y Gen. 57, 58 (emphasis added).

claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727.

The potential for diplomatic friction is manifest in this litigation. Both civil and criminal proceedings are pending in the Colombian courts to adjudge the lawfulness of the conduct of Colombian military officials. Duplicative proceedings in a U.S. court to second-guess the conduct of the Colombian military and the findings of Colombian courts could be viewed by Colombia as "unwarranted and intrusive," and as a slight to the Colombian judicial system. E.R. 410. The litigation could, in short, be viewed as an affront to the sovereignty of the Colombian government, with corresponding ill effects on our foreign relations with an important ally. Accordingly, and as set forth above, in the absence of a Congressional directive, this Court should not permit a claim under Section 1350 challenging the conduct of a foreign government against its own citizens and within its own territory.[8]

[8] At the very least, no such cause of action should be recognized in the absence of extraordinary circumstances, such as where there is no functioning government and the political branches have determined that it would be appropriate to apply U.S. law (incorporating international law).

B. Absent Congressional Directive, A Court Should Not Impose Civil Aiding-And-Abetting Liability Under The ATS.

The United States takes no position on the question whether the plaintiffs' claims under Section 1350 are based on aiding and abetting.[9] However, the United States respectfully disagrees with the district court's suggestion that Section 1350 provides for civil damages for aiding and abetting.

1. An aiding-and-abetting claim is not within the plain terms of the ATS, which applies to a "civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. Such a claim is brought not against a party who has "committed" a tort in violation of international law, but against a third party who allegedly provided aid and assistance to the tortfeasor.

Nor should a court impose civil aiding-and-abetting liability under the ATS, thereby extending even further the reach of any implied claim against the primary wrongdoer that the court might recognize. As the Supreme Court recognized in *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), imposing civil liability for aiding and abetting constitutes a "vast expansion" of the scope of an implied

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[9] Relying upon a vacated opinion of this Court, *see* note 3, *supra*), the district court held that aiding and abetting claims were permissible under Section 1350. *See* E.R. 657 n.6. The court did not specifically address whether the plaintiffs had asserted non-aiding-and-abetting claims under Section 1350, but did hold that the claims brought under the TVPA were not limited to aiding and abetting. *See* E.R. 653-654.

private right of action that should not be recognized in the absence of "congressional direction to do so." *Id.* at 183. The Court held that the existence of criminal aiding-and-abetting liability was not a sufficient basis to infer a private cause of action for civil aiding-and-abetting liability. *Id.* at 190-191.

The teaching of *Central Bank*, that a court should not infer civil aiding-and-abetting liability based on the existence of civil liability for primary wrongdoers, is equally applicable in the context of imposing aiding-and-abetting liability under Section 1350 as a matter of federal common law. Although *Sosa* holds that federal courts have "implicit sanction" to entertain a narrow set of common-law claims drawn from international-law norms, Court explicitly cautioned against the exercise of "innovative authority over substantive law" without "legislative guidance." 542 U.S. at 712, 726. Imposing private liability not only on those persons who violate a narrow set of international-law norms but also on any persons who aid and assist the primary wrongdoer would constitute a vast expansion of the scope of liability. Absent Congressional directive, this court should decline to "pile inference upon inference," *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1019 (7th Cir. 2002), under its narrow common-law authority.

2. The significant adverse practical and policy consequences of imposing civil aiding-and-abetting liability as a matter of federal common law under Section 1350 weigh heavily against such a claim.

Civil aiding-and-abetting liability would interfere with the U.S. Government's ability to employ the full range of foreign policy options when interacting with various foreign governments, including those with questionable human rights practices. One policy option is to promote active economic engagement by private U.S. corporations as a method of encouraging reform and gaining leverage in the foreign country. The determination whether to pursue such a policy is the type of foreign affairs question constitutionally vested in the Executive Branch. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

While the benefits of economic engagement have been debated, the United States has sometimes chosen to follow that approach. In the case of China, for example, economic engagement has been viewed as a potential means to advance human rights over the long term and to serve important U.S. interests by discouraging "disruptive action" and fostering public pressure for "greater

political pluralism and democracy." Congressional Research Service, *Issue Brief for Congress: China-U.S. Relations* 13 (Jan. 31, 2003).

In South Africa in the 1980s, the United States employed both economic engagement and limited sanctions to encourage the South Africa government to end apartheid. *See* Pub. L. No. 99-440, §§ 4, 101; National Security Decision Directive 187 (1985). In addition to funding educational, labor, and business programs, the United States urged U.S. businesses to "assist black-owned companies." National Security Directive 187, at 2. At the same time, the United States strongly condemned the practice of apartheid and prohibited certain transactions between U.S. institutions and the South Africa government. *See* Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 9, 1985); Pub. L. No. 99-440, §§ 304-305 (1986).

Judicial imposition of aiding-and-abetting liability under Section 1350 would undermine the Executive's ability to employ economic engagement as an effective tool for foreign policy, by deterring companies from doing business in countries with questionable human rights records. Indeed, lawsuits are currently pending before the U.S. Court of Appeals for the Second Circuit seeking to impose civil liability on private companies that did business in apartheid-era South Africa during the period of the United States' policy of economic engagement.

See In re South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), appeal pending, No. 05-2141-cv (2d Cir.). The district court in that litigation specifically pointed to the serious foreign-relations concerns that would result as grounds for refusing to impose aiding-and-abetting liability under the ATS. *See* 346 F. Supp. 2d at 550-551.

Adopting aiding-and-abetting liability under Section 1350 would also spur more lawsuits, resulting in greater diplomatic friction. Aiding and abetting could be the basis for a wide range of claims that, although brought against third-party corporations, nonetheless sought to challenge the lawfulness of a foreign government's conduct — which as *jure imperii* is typically immune from direct challenge under the Foreign Sovereign Immunities Act, *see* 28 U.S.C. §§ 1604, 1605(a)(5). Experience has shown that such suits often trigger foreign government protests, both from the nations where the alleged abuses occurred and, in some instances, from the nations where the corporations are based. Serious diplomatic friction can lead to a lack of cooperation with the United States Government on important foreign policy objectives. "To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of [a] Court's duty to

engage in 'vigilant doorkeeping.'" *In re: South African Apartheid Litig.*, 346 F. Supp. 2d at 550 (quoting *Sosa*, 542 U.S. at 729).

Finally, civil aiding-and-abetting liability could deter the free flow of trade and investment, because of the uncertainty it creates for those operating in countries where abuses might occur. The United States has a general interest in promoting trade and investment in order to increase jobs and the standard of living in this country. The United States also has an interest in promoting economic development in other countries as a means of increasing stability, democracy, and security, both in those countries and worldwide.

As set forth in the State Department letter attached to the United States' Supplemental Statement of Interest, the potential harms threatened by imposition of civil aiding-and-abetting liability are present in this very litigation. The State Department has explained that permitting claims such as the plaintiffs' to go forward could "deter[] present and future U.S. investment in Colombia," and that reduced investment, "particularly in the oil and extractive industries, could harm Colombia's economy" with potential "harmful consequences for the United States and our interests in Colombia and the Andean region." E.R. 410. These consequences, the State Department notes, include potential harm to U.S. efforts to diversify our sources of imported oil as well as joint U.S.-Colombia initiatives

against narcotics trafficking and terrorism. E.R. 410. Permitting the plaintiffs' challenge to go forward could also undercut efforts within the Colombian legal system to redress the alleged harms, as well as the United States' efforts to encourage Colombia "to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses." E.R. 410. These adverse effects on our foreign policy interests weigh heavily against imposition of aiding-and-abetting liability as a matter of federal common law under Section 1350.

3. Aiding-and-abetting liability fails to satisfy the necessary requirement under *Sosa* of being based on an international-law norm of universal or near-universal acceptance. Virtually the only international source even to mention non-criminal aiding and abetting liability is a draft article by the International Law Commission. *See* United Nations General Assembly Resolution 56/83 & Annex, art. 16, adopted Jan. 28, 2002. That draft article has no relevance here because it extends liability only to States that aid and abet the wrongful act of another State. *Compare Sosa*, 542 U.S. at 732 & n.20 (court considering whether to recognize cause of action should consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued").[10]

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[10] The district court relied on a 1795 opinion from Attorney General William Bradford in support of the conclusion that Section 1350 imposes aiding-and-

(continued...)

In order to adjudicate a claim for civil liability based on aiding and abetting an asserted violation of international law, a federal court would be required to confront a host of issues not addressed by international law, including allocation of liability among multiple tortfeasors, the standard of causation, and whether it is appropriate to impose liability on an alleged aider and abettor where the primary tortfeasor is immune from suit. This wholesale law-making is a far cry from the careful and narrow steps envisioned in *Sosa*. The caution mandated by *Sosa* in deciding whether to recognize and enforce an international-law norm under Section 1350, when coupled with the teaching of *Central Bank* that the decision whether to adopt aiding-and-abetting liability for a civil claim is typically a legislative policy judgment, leads inexorably to the conclusion that a court should not impose aiding and abetting liability under Section 1350 absent further congressional action.

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[10](...continued)
abetting liability. That opinion, however, involved the question whether American citizens who breached the United States' state of neutrality in the war between England and France by "join[ing], conduct[ing], aid[ing], and abett[ing] a French fleet in attacking" a British settlement on the coast of Africa and "plundering or destroying the property" of the British settlers were subject to criminal prosecution in a U.S. court. 1 Op. Atty. Gen. 57, 58. Although the Attorney General opined that an injured person might "have a remedy by a civil suit in the courts of the United States" under Section 1350, *id.* at 58-59, he did not address the substantive basis for claims against the defendants — who had themselves committed unlawful conduct — much less endorse aiding-and-abetting liability.

III. THE PLAINTIFFS' CLAIMS UNDER CALIFORNIA LAW ARE ALSO BARRED.

As the district court recognized, the United States' foreign policy can have preemptive force, and can, under our Constitution, preclude the application of inconsistent state law. Even in the domestic context, several constitutional provisions limit a state's ability to project its substantive law onto conduct that occurs wholly outside its borders. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (Due Process Clause); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause); *Thomas v. Washington Gas & Light Co.*, 448 U.S. 261, 272 (1980) (plurality) (Full Faith and Credit Clause). These limitations also restrict a court's ability to apply the forum state's law to such conduct pursuant to choice-of-law analysis. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816-817 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality).

Projection by a state of its legal norms onto conduct that occurs wholly within the sovereign territory of a foreign *nation* presents even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy, as the Supreme Court has recognized in cases involving preemption of conflicting state law, *see Crosby v. NFTC*, 530 U.S. 363, 384-386 (2000); *Garamendi*, 539 U.S. at 420-425; *Japan Line, Inc. v. County of Los Angeles*, 441

U.S. 434, 447-449 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434-435 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 65-68, 73-74 (1941), and extraterritorial application of federal law. *See Arabian Am. Oil*, 499 U.S. at 248. Where litigation implicates the United States' foreign relations, the unique federal interests at stake may require application of federal, rather than state, law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-427 (1964); *Ungaro-Benages*, 379 F.3d at 1232.

These constitutional principles underscore the need for particular concern in balancing the relative interests of the state that seeks to apply its tort law to conduct involving a foreign government abroad, and the interests of the foreign government and, where relevant, our National Government. As the district court here recognized, any interest of California in applying its law to the alleged events in Colombia is "weak," *see* E.R. 684, while the interests of Colombia (and the United States) in having the dispute adjudicated in Colombia under Colombian law are strong. *See* E.R. 684-686. It is unnecessary for this Court to determine whether the federal foreign policy interests in this litigation would displace state law under the Constitution, however, because, even under state choice-of-law rules, the interests of the Colombian government require application of Colombian law — which the district court found would bar the state-law claims — to a

dispute arising in Colombia, involving alleged harm to Colombian citizens, and challenging the lawfulness of the conduct of the Colombian military.

California's choice-of-law test is based on the relative interests of the governments involved in application of their law to the dispute. *See Hurtado v. Superior Court*, 11 Cal. 3d 574, 580 (Cal. 1974). The State where the challenged conduct occurred has a "predominant interest" in regulating conduct within its borders. *See id.* at 583. In contrast, as the district court correctly recognized, the state in which the defendant resides, California, has at most a "weak interest" in application of its law. E.R. 684.[11]

Although the district court did not engage in a formal choice-of-law analysis, the court held that Colombian law would bar the plaintiffs' claims (so long as the damages award in their favor is not reversed on appeal) on the principle "that no one can collect and receive indemnification for the same damage

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[11] Although the plaintiffs suggested in their opening brief (at pp. 53-54) that California has a substantial interest in application of its own law by virtue of defendant Occidental's incorporation in the State, this Court has recognized that a state's "interest in regulating its resident corporations' conduct" is an inadequate basis for application of that state's law, where the corporation's contacts with the state "are not significantly related to the cause of action." *Abogados v. AT&T, Inc.*, 223 F.3d 932, 936 (9th Cir. 2000). Here, the plaintiffs' tort-law claims have nothing to do with Occidental's contacts with California. The plaintiffs cite California's statutory restriction on unfair business practices as proof of the State's regulatory interest, but the claim under that statutory provision was dismissed as time-barred, and the plaintiffs have not challenged that ruling on appeal.

or loss several times." E.R. 721. California would appear to have *no* interest in denying application of that rule, because California follows the same principle that a plaintiff may not obtain "double recovery for the same wrong." *Vesey*, 626 F.2d at 633; *cf. Estate of Darulis v. Garate*, 401 F.3d 1060, 1062 (9th Cir. 2005) (recognizing that court is not required to balance relative interests if foreign law and California law do not differ in relevant part). In any event, to the extent that a conflict exists, Colombian law must govern in light of California's weak interests as compared to the strong interests of the Colombian government.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief Of The United States As Amicus Curiae In Support Of Affirmance were served on the following counsel by overnight delivery, postage prepaid, on March 17, 2006:

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